(2)

No. 90-631

IN THE

# Supreme Court of the United States

October Term, 1990

CRANFORD INSURANCE COMPANY, now known as AMERICAN SPECIAL RISK INSURANCE COMPANY, a Delaware Corporation; SPHERE INSURANCE COMPANY, LTD.; now known as SPHERE DRAKE INSURANCE, PLC, a British Corporation; INTERNATIONAL INSURANCE COMPANY, an Illinois Corporation,

*Petitioners,*

v.

ROHM & HAAS COMPANY; SOUTH MACOMB DISPOSAL AUTHORITY; WASTE MANAGEMENT, INC.; CHEMICAL WASTE MANAGEMENT, INC.; GENERATORS OF WASTE AT THE ENVIRONMENTAL CONSERVATION AND CHEMICAL CORPORATION SITE, in Zionsville, Indiana,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## BRIEF IN OPPOSITION TO PETITION

WILLIAM H. HYATT, JR.
PITNEY, HARDIN, KIPP & SZUCH
P.O. Box 1945
Morristown, NJ 07962-1945
(201) 966-6300
*Counsel for Respondents*

December 19, 1990

## QUESTIONS PRESENTED

1. Whether certiorari should be denied because a purported conflict among the Circuit Courts of Appeal does not exist.

2. Whether certiorari should be denied because Fed. R. Civ. P. 24(b) does not require a permissive intervenor seeking to modify a protective order in a settled and dismissed action to assert an independent basis of federal jurisdiction or file a pleading asserting a claim or defense.

# LIST OF PARTIES

**Parties**

Respondents adopt the identification of parties set forth in the Petition at page ii.

**Corporate Disclosure**

The corporate affiliation disclosure required by Supreme Court Rule 29.1 for each of the Respondents is listed in the Appendix to this Brief at pages Ra1-Ra20.

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| QUESTIONS PRESENTED | i |
| LIST OF PARTIES | ii |
| TABLE OF AUTHORITIES | iv |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR DENYING THE WRIT | 3 |
| ARGUMENT | 5 |
| I. Certiorari Should Be Denied Because A Purported Conflict Among The Circuit Courts Of Appeal Does Not Exist | 5 |
| II. Certiorari Should Be Denied Because Fed. R. Civ. P. 24 Does Not Require A Permissive Intervenor Seeking To Modify A Protective Order In A Settled And Dismissed Action To Assert An Independent Basis Of Federal Jurisdiction Or File A Pleading Asserting A Claim Or Defense. | 15 |
| CONCLUSION | 20 |
| APPENDIX | Ra1 |

# TABLE OF AUTHORITIES

PAGE

**Cases:**

*Abramson* v. *Pennwood Inv. Corp.*, 392 F.2d 759 (2d Cir. 1968) ..... 18

*American Tel. & Tel. Co.* v. *Grady*, 594 F.2d 594 (7th Cir. 1978) (per curiam), *cert. denied*, 440 U.S. 971 (1979) ..... 7

*Arvida Corp.* v. *City of Boca Raton*, 59 F.R.D. 316 (S.D. Fla. 1973) ..... 18

*Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534 (1986) ..... 18

*Cippollone* v. *Liggett Group, Inc.*, 113 F.R.D. 86 (D.N.J. 1986), *aff'd*, 822 F.2d 335 (3d Cir.), *cert. denied*, 484 U.S. 976 (1987) ..... 13

*Deford* v. *Schmid Products Co.*, 120 F.R.D. 648 (D. Md. 1987) ..... 14

*DeFunis* v. *Odegaard*, 416 U.S. 312 (1974) ..... 4

*Diamond* v. *Charles*, 476 U.S. 54 (1986) ..... 15

*Ex parte Uppercu*, 239 U.S. 435 (1915) ..... 13

*FDIC* v. *Ernst & Ernst*, 677 F.2d 230 (2d Cir. 1982) ..... 10

*Finley* v. *United States*, 490 U.S. 545 (1989) ..... 15

*GAF Corp.* v. *Eastman Kodak Co.*, 415 F. Supp. 129 (S.D.N.Y. 1976) ..... 10

*In re "Agent Orange" Product Liability Lit.*, 821 F.2d 139 (2d Cir.), *cert. denied*, 484 U.S. 953 (1987) .... 5, 7, 10, 12

*In re Beef Industry Antitrust Lit.*, 589 F.2d 786 (5th Cir. 1979) ..... 17, 19

PAGE

*Iowa Beef Processors, Inc.* v. *Bagley*, 601 F.2d 949 (8th Cir.), *cert. denied sub nom., Iowa Beef Processors, Inc.* v. *Smith*, 441 U.S. 907 (1979) ..... 6, 10, 11

*Layne & Bowler Corp.* v. *Western Well Works*, 261 U.S. 387 (1923) ..... 4

*Lesnik* v. *Public Industrial Corp.*, 144 F.2d 968 (2d Cir. 1944) ..... 17

*Magenau* v. *Aetna Freight Lines*, 360 U.S. 273 (1959) ..... 3

*Martindell* v. *International Tel. & Tel. Corp.*, 594 F.2d 291 (2d Cir. 1979) ..... 6, 9, 10, 11, 17, 19

*Meyer Goldberg, Inc. of Lorain* v. *Fisher Foods, Inc.*, 823 F.2d 159 (6th Cir. 1987) ..... 5, 17

*Miami County Nat. Bank of Paola, Kan.* v. *Bancroft*, 121 F.2d 921 (10th Cir. 1941) ..... 18

*NAACP* v. *New York*, 413 U.S. 345 (1973) ..... 15

*Navarro Savings Ass'n* v. *Lee*, 446 U.S. 458 (1980) ..... 16

*Nestle Foods Corp.* v. *Aetna Casualty and Surety Co.*, 129 F.R.D. 483 (D.N.J. 1990) ..... 13

*Olympic Refining Co.* v. *Carter*, 332 F.2d 260 (9th Cir.), *cert. denied*, 379 U.S. 900 (1964) ..... 6, 7

*Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365 (1978) ..... 15

*Palmieri* v. *State of New York*, 779 F.2d 861 (2d Cir. 1985) ..... 10

*Parkway Gallery Furniture, Inc.* v. *Kittinger/Pennsylvania House Group, Inc.*, 121 F.R.D. 264 (M.D.N.C. 1988), *aff'd*, 878 F.2d 801 (1989) ..... 12, 14

*Public Citizen* v. *Liggett Group, Inc.*, 858 F.2d 775 (1st Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989) ... 6, 17, 18

PAGE

*Segal* v. *Rochelle*, 382 U.S. 375 (1966) ..... 3

*Shevlin* v. *Schewe*, 809 F.2d 447 (7th Cir. 1987) ..... 18

*Spring Construction Co., Inc.* v. *Harris*, 614 F.2d 374 (4th Cir. 1980) ..... 18

*Superior Oil Co.* v. *American Petrofina Co. of Texas*, 785 F.2d 130 (5th Cir. 1986) (per curiam) ..... 6

*U.S.* v. *Hooker Chemicals & Plastics Corp.*, 90 F.R.D. 421 (W.D.N.Y. 1981) ..... 14

*United Nuclear Corp.* v. *Cranford Insurance Co.*, 905 F.2d 1424 (10th Cir. 1990) ..... 1

*Ward* v. *Ford Motor Co.*, 93 F.R.D. 579 (D. Col. 1982) .... 14

*Wichita R. & Light Co.* v. *Public Utilities Comm'n*, 260 U.S. 48 (1922) ..... 16

*WJA Realty Ltd. Partnership* v. *Nelson*, 708 F. Supp. 1268 (S.D. Fla. 1989) ..... 18

*Wilk* v. *American Medical Ass'n*, 635 F.2d 1295 (7th Cir. 1981) ..... 6, 8, 11

*Wilson* v. *American Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985) ..... 13

*Wyeth Laboratories* v. *United States District Court*, 851 F.2d 321 (10th Cir. 1988) ..... 13

PAGE

**STATUTES AND RULES:**

28 U.S.C. §1332(a)(1) ..... 16

Fed. R. Civ. P. 1 ..... 3, 5, 7, 13

Fed. R. Civ. P. 24 ..... 4, 15, 19

Fed. R. Civ. P. 24(b) ..... 2

Fed. R. Civ. P. 24(b)(2) ..... 5, 17

Fed. R. Civ. P. 24(c) ..... 15, 17, 18, 19

Fed. R. Civ. P. 26(c) ..... 4, 5, 6, 7, 8, 12, 14

Fed. R. Civ. P. 26(c)(7) ..... 12

Fed. R. Civ. P. 34 ..... 2

Fed. R. Civ. P. 82 ..... 17

Sup. Ct. R. 29.1 ..... ii

**OTHER AUTHORITIES:**

S. Estreicher & J. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681 (1984) ..... 4

Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L. Rev. 1 (1983) ..... 14

*Nonparty Access to Discovery Materials In the Federal Courts*, 94 Harv. L. Rev. 1085 (1981) ..... 7, 11, 12

3B *Moore's Federal Practice*, §24.14 (2d ed. 1990) ..... 18

No. 90-631

IN THE

# Supreme Court of the United States

October Term, 1990

---

CRANFORD INSURANCE COMPANY, now known as AMERICAN SPECIAL RISK INSURANCE COMPANY, a Delaware Corporation; SPHERE INSURANCE COMPANY, LTD.; now known as SPHERE DRAKE INSURANCE, PLC, a British Corporation; INTERNATIONAL INSURANCE COMPANY, an Illinois Corporation,

*Petitioners*,

v.

ROHM & HAAS COMPANY; SOUTH MACOMB DISPOSAL AUTHORITY; WASTE MANAGEMENT, INC.; CHEMICAL WASTE MANAGEMENT, INC.; GENERATORS OF WASTE AT THE ENVIRONMENTAL CONSERVATION AND CHEMICAL CORPORATION SITE, in Zionsville, Indiana,

*Respondents*.

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

---

## BRIEF IN OPPOSITION TO PETITION

---

Respondents, Rohm & Haas Company, South Macomb Disposal Authority, Waste Management, Inc., Chemical Waste Management, Inc., and Generators of Waste at the Environmental Conservation and Chemical Corporation Site, in Zionsville, Indiana, respectfully request that this Court deny the Petition for a Writ of Certiorari which seeks review of the opinion of the Tenth Circuit Court of Appeals reported at 905 F.2d 1424 (10th Cir. 1990).

## STATEMENT OF THE CASE

In May 1985, United Nuclear Corporation ("UNC") filed a declaratory judgment action in New Mexico state court seeking coverage for environmental claims under Environmental Impairment Liability ("EIL") policies issued by Petitioners Cranford Insurance Company (n/k/a American Special Risk Insurance Company), Sphere Insurance Company, Ltd. (n/k/a Sphere Drake Insurance, PLC.) and International Insurance Company (the "UNC action"). In June 1985, Petitioners removed this action to the United States District Court for the District of New Mexico.

In December 1985, UNC filed a Request for Production of Documents. In February 1986, the parties stipulated to the entry of a protective order (the "Protective Order"), Pet. App. 22a-25a, and Petitioners produced the requested documents.[1] Shortly thereafter, in June 1986, the parties entered into a settlement agreement. In August 1986, on Petitioners' Motion, the District Court dismissed the UNC action and ordered the court record and files sealed until further order of the court. Pet. App. 17a.

Each Respondent is a party in a separate declaratory judgment action seeking coverage for environmental claims under EIL policies issued by one or more of the Petitioners. On May 2, 1989, Respondents moved to intervene in the UNC action pursuant to Fed. R. Civ. P. 24(b) to modify the definition of "authorized persons" set forth in the Protective Order so that they could gain access to relevant discovery materials for use in those collateral lawsuits. Included in Respondents' motion papers was a Request for Production of Documents pursuant to Fed. R. Civ. P. 34.

On August 14, 1989, the District Court granted Respondents' motion for intervention. The District Court found that the inter-

---

[1] In May 1986, the parties stipulated to the entry of an amended protective order. Pet. App. 26a-28a. The amended order varied from the original order only to the extent that it provided for a limited waiver as to certain attorney-client communications and attorney work product that had been inadvertently produced by Petitioners.

pretation of EIL policies issued by or through Petitioners is common to Respondents' pending litigation across the country and that "Rule 24 intervention is the procedurally correct course" for obtaining discovery from the UNC action. Pet. App. 12a. The District Court concluded that "[a]llowing the movants access to the relevant information will avoid time consuming and costly duplication of discovery in accordance with the mandate of Fed. R. Civ. P. 1 to 'secure the just, speedy and inexpensive determination of every action.' " Pet. App. 12a. In allowing Respondents access to this information, the District Court ordered that "[a]ll intervening parties shall use the information obtained solely for the purpose of litigating their current lawsuits and shall be otherwise fully bound by the terms of the existing protective order." Pet. App. 13a.

The District Court denied Petitioners' motion to stay its Order pending appeal to the Tenth Circuit Court of Appeals. The Tenth Circuit Court of Appeals likewise denied Petitioners' Emergency Application for a Stay of the District Court's Order pending appeal. Pet. App. 14a. Thereafter, the requested material was produced to Respondents.

On June 15, 1990, the Tenth Circuit Court of Appeals affirmed the District Court's decision. Pet. App. 1a-8a. This Petition for a Writ of Certiorari to the Tenth Circuit Court of Appeals followed.

## REASONS FOR DENYING THE WRIT

In considering whether to grant certiorari to resolve a conflict between the Circuit Courts of Appeal, this Court focuses on the significance of the issue in conflict. *See Segal* v. *Rochelle*, 382 U.S. 375, 378 (1966). As stated in *Magenau* v. *Aetna Freight Lines*, 360 U.S. 273 (1959):

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the

> public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.

*Id.* at 284-85 (*quoting Layne & Bowler Corp.* v. *Western Well Works*, 261 U.S. 387, 393 (1923)). *See generally* S. Estreicher & J. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 722-28 (1984).

The issues Petitioners seek to bring before this Court cannot pass this test. First, the dispute in this action involves a straightforward discovery question in which the trial court is called upon to exercise its broad discretion in construing and enforcing the Federal Rules of Civil Procedure. In addition, despite their protestations to the contrary, Petitioners must overcome (1) the acknowledged mootness of this dispute,[2] (2) the absence of a split among the Circuit Courts of Appeal as to the legal issues raised, and (3) the total lack of legal, factual or even logical support for their interpretation of Fed. R. Civ. P. 24 under the circumstances here present.

As for the alleged conflict among the Circuit Courts of Appeal regarding the standard for modifying a protective order, Respondents submit no such conflict exists. Rather, the Circuit Courts each upheld the same legal principle, *i.e.*, the requirement of Fed. R. Civ. P. 26(c) that "good cause" be shown in order for a protective order to issue initially or to remain in force thereafter. In fulfilling that mandate, the Circuit Courts have acknowledged

---

[2] The questions presented are moot because the documents have been produced to and used by the Respondents in the collateral litigation for which they were obtained. Petitioners will not be prejudiced by this disclosure because, as noted previously, Respondents are limited in their use of the information by the terms of the Protective Order. Because the resolution of this type of discovery dispute is fact dependent and subject to the trial court's discretion in each case, the "capable of repetition yet evading review" exception permitting review of moot questions does not justify review in this case. *See DeFunis* v. *Odegaard*, 416 U.S. 312, 319-20 n.5 (1974).

the district court's broad discretion in eliciting and then balancing the respective interests of the parties to the discovery dispute and resolving such matters on a case-by-case basis. The purported conflict urged by Petitioners is not a conflict between opinions or authorities, but rather only a difference in the outcomes reached by particular courts based on the specific and varying facts before them. With regard to the need to balance the interests in disclosure and protection of documents after disclosure and to uphold the standards set forth in Fed. R. Civ. P. 1 and 26(c), the Circuit Courts are in complete agreement.

Finally, Petitioners' argument that Fed. R. Civ. P. 24(b)(2) was unavailable to Respondents in the absence of complete diversity and a filed pleading hardly warrants a serious reply. It suffices to say that all the cases addressing non-party access to protected discovery materials acknowledge that the appropriate method to seek that relief is by way of a motion for permissive intervention and no federal case explicitly or implicitly requires the permissive intervenor in that context to establish an independent basis for federal jurisdiction or to file a pleading.

Under the circumstances, therefore, there is no cause for this Court to exercise its certiorari jurisdiction and the Petition should be denied.

## ARGUMENT

### I.

### Certiorari Should Be Denied Because A Purported Conflict Among The Circuit Courts Of Appeal Does Not Exist

Whether to lift or modify a protective order is a decision committed to the sound discretion of the trial court, subject to review only for an abuse of that discretion. *See, e.g., In re "Agent Orange" Product Liability Lit.*, 821 F.2d 139, 147 (2d Cir.), *cert. denied*, 484 U.S. 953 (1987); *Meyer Goldberg, Inc. of Lorain* v. *Fisher*

*Foods, Inc.*, 823 F.2d 159, 161-63 (6th Cir. 1987). In the face of such broad discretion, which counsels against this Court's review of this matter, Petitioners invoke the specter of a "true and direct" conflict of opinion among the Circuit Courts of Appeal concerning the standard by which such discovery disputes should be decided.

According to Petitioners, the Tenth Circuit here adopted an approach previously adopted by the Seventh and Ninth Circuits, *see Wilk* v. *American Medical Ass'n*, 635 F.2d 1295 (7th Cir. 1981) and *Olympic Refining Co.* v. *Carter*, 332 F.2d 260 (9th Cir.), *cert. denied*, 379 U.S. 900 (1964),[3] which, in Petitioners' view, frustrates the intended purpose of Fed. R. Civ. P. 26(c) by placing the "burden of persuasion" in the face of a request for modification of a protective order on the party opposing such modification.[4] By contrast, Petitioners read *Martindell* v. *International Tel. & Tel. Corp.*, 594 F.2d 291 (2d Cir. 1979) and *Iowa Beef Processors, Inc.* v. *Bagley*, 601 F.2d 949 (8th Cir.), *cert. denied sub nom., Iowa Beef Processors, Inc.* v. *Smith*, 441 U.S. 907 (1979), as appropriately placing the "burden of persuasion" on the party seeking modification.

A review of these cases does not disclose the alleged conflict which Petitioners' argument manufactures. Rather, consistent with the "good cause" analysis required to maintain any protective order pursuant to Fed. R. Civ. P. 26(c), each of these cases is fact sensitive and turns upon an informed application of appropriate discretion in conducting that analysis. Accordingly, the exercise of this Court's certiorari jurisdiction would be

---

[3] *Accord Public Citizen* v. *Liggett Group, Inc.*, 858 F.2d 775, 791 (1st Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989); *Superior Oil Co.* v. *American Petrofina Co. of Texas*, 785 F.2d 130 (5th Cir. 1986) (per curiam).

[4] Petitioners' additional argument that the Tenth Circuit's decision has the effect of frustrating settlements is unpersuasive for the simple reason that in most settlements (and most protective orders) the parties obtain the return of their respective documents after the case is settled. Thus, as a general matter, there will be no issue with respect to the continuation of a protective order.

inappropriate where such wide discretion is afforded the district courts.

Rule 26(c) mandates that protective orders can be issued only for "good cause" shown. As noted by the Second Circuit,

> A plain reading of the language of Rule 26(c) demonstrates that the party seeking a protective order has the burden of showing that good cause exists for issuance of that order. It is equally apparent that the obverse also is true, i.e., if good cause is not shown, the discovery materials in question should not receive judicial protection and therefore would be open to the public for inspection. . . . Any other conclusion effectively would negate the good cause requirement of Rule 26(c): Unless the public has a presumptive right of access to discovery materials, the party seeking to protect the materials would have no need for a judicial order since the public would not be allowed to examine the materials in any event.

*In re "Agent Orange" Product Liability Lit., supra,* 821 F.2d at 145-46. The "good cause" requirement furthers the time-honored tradition that civil discovery take place in the public eye. *See, e.g., American Tel. & Tel. Co. v. Grady,* 594 F.2d 594, 596 (7th Cir. 1978) (per curiam), *cert. denied,* 440 U.S. 971 (1979). *Accord Olympic Refining Co.* v. *Carter, supra,* 332 F.2d at 264. *See generally Nonparty Access To Discovery Materials In The Federal Courts,* 94 Harv. L. Rev. 1085, 1085-86 (1981).

In debating the propriety of modifying the Protective Order here, both sides to this dispute claim to advance the goal required by Fed. R. Civ. P. 1 in construing the Federal Rules of Civil Procedure: "the just, speedy, and inexpensive determination of every action." However, although a protective order may serve these interests initially—to the extent it avoids motion practice and encourages timely and responsive disclosure—it also frustrates that goal with regard to collateral litigation. To ensure that protective

orders both serve their intended purposes and restrict discovery as little as possible, federal courts faced with requests to modify existing protective orders revisit the "good cause" requirement of Rule 26(c) to make the same ultimate determination of whether continued protection of discovery materials is warranted.

The Seventh Circuit's application of the "good cause" analysis can best be seen in *Wilk* v. *American Medical Ass'n, supra:*

> This presumption [of open discovery] should operate with all the more force when litigants seek to use discovery in aid of collateral litigation on similar issues, for in addition to the abstract virtues of sunlight as a disinfectant, access in such cases materially eases the tasks of courts and litigants and speeds up what may otherwise be a lengthy process. . . . We therefore agree with the result reached by every other appellate court which has considered the issue, and hold that where an appropriate modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another's discovery, such modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification.

*Id.* at 1299 (citations omitted). To protect the party opposing modification, however, the Seventh Circuit concluded that "[o]nce such prejudice is demonstrated . . . the district court has broad discretion in judging whether that injury outweighs the benefits of any possible modification of the protective order." *Id.* Consistent with the Rule 26(c) requirement that "good cause" be shown by the party seeking the protective order in the first place, the Seventh Circuit test focuses on "good cause" for continued protection (*i.e.*, tangible prejudice to substantial rights) of the party resisting additional disclosure.

Virtually every federal case to consider this issue—including the Tenth Circuit in this case—has employed this standard, re-

quiring proof of continued "good cause" for protection and exercising discretion in judging the strength of the required showing and balancing disclosure and protection interests. For example, the Tenth Circuit here, cognizant of the dueling efficiency considerations cited by both sides, satisfied itself that "any legitimate interest the [Petitioners] have in continued secrecy as against the public at large can be accommodated by placing [Respondents] under the restrictions on use and disclosure contained in the original order," 905 F.2d at 1428, which is precisely what the District Court had done in modifying the Protective Order.

The Second and Eighth Circuits did not adopt a different standard of analysis. Rather, they too balanced continued "good cause" for protection against the interests served by disclosure prior to authorizing additional disclosure. However, unlike the instant case and the cases relied on by the Tenth Circuit, the decisions from the Second and Eighth Circuits cited by Petitioners did not involve the modification of a protective order at the request of a private litigant seeking discovery for its own case involving common issues of fact or law.

*Martindell* v. *International Tel. & Tel. Corp., supra,* 594 F.2d 291, involved a stockholders' derivative action against ITT and certain of its officers and directors stemming from alleged expenditures to influence the 1970 Chilean elections. *Id.* at 292-93. Discovery was conducted pursuant to a court-approved stipulation that discovery fruits would be used only in that litigation. *Id.* at 293. As the civil case was being settled, the federal government requested the deposition transcripts of twelve witnesses in connection with an investigation of possible crimes related to the subject matter of the civil suit. *Id.* The trial court denied the government access to the deposition transcripts "out of solicitude for the witnesses' Fifth Amendment rights," *id.* at 295, and the Second Circuit affirmed, stating that the trial court "did not abuse [its] discretion in refusing to vacate or modify [the] order." *Id.* at 297.

The crux of the Second Circuit's rationale was simply stated: "In short, witnesses might be expected frequently to refuse to testify pursuant to protective orders if their testimony were to be made available to the Government for criminal investigatory purposes in disregard of those orders." *Id.* at 295-96. The Court further reasoned that the federal government has "'awesome powers' which render unnecessary its exploitation of the fruits of private litigation." *Id.* at 296, quoting *GAF Corp.* v. *Eastman Kodak Co.*, 415 F. Supp. 129, 132 (S.D.N.Y. 1976). Accordingly, the Court concluded that "absent a showing of improvidence in the grant of a Rule 26(c) protective order or some extraordinary circumstance or compelling need," the order should not be modified. *Id.* at 296. On balance, "good cause" for a continued protective order outweighed the interests served by disclosure. Because "good cause" existed in the first place, the Court placed the burden on the government to show that "good cause" never existed, no longer existed or was outweighed by superior interests. *See also Palmieri* v. *State of New York*, 779 F.2d 861, 866 (2d Cir. 1985) (same analysis as *Martindell* where State sought access to protected materials); *FDIC* v. *Ernst & Ernst*, 677 F.2d 230 (2d Cir. 1982).[5]

*Iowa Beef Processors, Inc.* v. *Bagley, supra*, 601 F.2d 949, involved a suit for misappropriation of confidential information by former employees of Iowa Beef Processors ("IBP"), including defendant Bagley. A congressional subcommittee investigating pricing practices in the meat industry sought to obtain documents from Bagley, a former officer of IBP, which was the target of numerous private antitrust suits. *Id.* at 951. Thus, not only were the documents covered by a protective order, but the documents themselves were "an important part of the subject matter of the underlying lawsuit," *id.* at 954, as IBP claimed that Bagley had tak-

[5] However, in a subsequent case where the entity seeking access to protected materials was **not** the federal government, the Second Circuit questioned (without deciding) the application of the *Martindell* standard. *In re "Agent Orange" Product Liability Lit., supra*, 821 F.2d at 147.

en the documents without authorization when he left IBP's employ.

Bagley, an original party to the protective order, sought relief from its terms to give materials to the subcommittee. The district court modified the protective order and released the documents "without any showing that intervening circumstances had in any way obviated the potential prejudice to IBP" and "without any constraints on the Subcommittee's use thereof," which the Eighth Circuit believed "could well render moot in part IBP's claims for relief in the underlying lawsuit." *Id.* Under those circumstances, the Eighth Circuit found the district court had abused its discretion in modifying the protective order as it did.

Because of unique factual circumstances in *Martindell* and *Iowa Beef*, the Courts found "good cause" to leave the protective orders at issue undisturbed. The identity of the entity seeking disclosure of protected discovery, the relationship between the discovery requested and the merits of the underlying lawsuit, and the district court's inability or failure to sufficiently protect the interests of the parties opposing modification of the protective order, justified the Second and Eighth Circuit's conclusions that "good cause" existed for refusing to modify the protective orders as requested. Given the same set of facts, the Seventh Circuit likely would have reached the same conclusion. *See Wilk* v. *American Medical Ass'n, supra,* 635 F.2d at 1300 (distinguishing Second Circuit cases because of government involvement and resulting "unique danger of oppression"). *See generally* 94 Harv. L. Rev. at 1091-95.

Petitioners do this Court a disservice in characterizing the Circuit Court decisions as being in conflict because they "shift the burden of persuasion." In debating the continuing validity of a protective order, each party has the burden of persuading the court to exercise its discretion in favor of that party's position in the face of a given set of facts. The common approach of the Circuit Courts requires the parties to set forth their respective needs

for information and protection, and requires the district court to balance these interests and exercise discretion to protect both sides' interests in structuring any modification. Whether "good cause" is presumed and the non-party has the burden to rebut the presumption, or whether the party fighting disclosure has to establish continued "good cause" to maintain the protective order, the ultimate interests weighed and the standard to be met will be the same: the "good cause" for protection required by Rule 26(c).[6] Thus, whatever fact-specific, initial presumption is drawn by a particular court in a particular case has no significance in this case and does not warrant this Court's intervention.

What is significant in the cited cases is the question of what does and does not constitute the "good cause" necessary to maintain a protective order. For example, "good cause" includes the protection of trade secrets and similar information.[7] Fed. R. Civ. P. 26(c)(7). On the other hand, the primary purpose motivating Petitioners here—preventing publication of presumably damaging information for use in collateral litigation—has been repeatedly declared to be an improper motivation for restricting access to discovery. Indeed, in a factually-similar case involving insurers seeking a protective order in an insured's action for coverage for

---

[6] This reconsideration of "good cause" is especially important because the "good cause" showing required by Rule 26(c) has been largely obviated by the increasingly common use of blanket protective orders entered by stipulation of the parties with court approval, often without any "good cause" analysis. *See generally Parkway Gallery Furniture, Inc.* v. *Kittinger/Pennsylvania House Group, Inc.*, 121 F.R.D. 264, 267-68 (M.D.N.C. 1988), *aff'd*, 878 F.2d 801 (1989); 94 Harv. L. Rev. at 1089-90. In fact, the Second Circuit has expressed its disfavor of this practice, noting that such "improvidence in the granting of a protective order is yet another justification for lifting or modifying" a protective order. *In re "Agent Orange" Product Liability Lit., supra*, 821 F.2d at 148. The Protective Order here is such a stipulated order—reciting simply that the disclosed materials will be treated as "confidential"—and was never subjected to a thorough Rule 26(c) examination.

[7] This concern is not germane to this case, however, as Petitioners have never claimed that the protected documents contained "confidential" information within the meaning of Rule 26(c)(7).

environmental harm, one district court dismissed such a rationale directly and succinctly:

> [I]f the basis for defendants' motion is to prevent information from being disseminated to other potential litigants, then defendants' application must fail. With increasing frequency, defendants, as well as other insurers, are finding themselves embroiled in litigation over whether there is coverage for property damage as a result of environmental harm. The courts have emphatically held that a protective order cannot be issued simply because it may be detrimental to the movant in other lawsuits. . . . Using fruits of discovery from one lawsuit in another litigation, and even in collaboration among various plaintiffs' attorneys, comes squarely within the purposes of the Federal Rules of Civil Procedure.

*Nestle Foods Corp.* v. *Aetna Casualty and Surety Co.*, 129 F.R.D. 483, 486 (D.N.J. 1990) (footnote and citations omitted).

The concept of "shared discovery" has been endorsed repeatedly by the majority of federal courts because it responds to the mandate of Fed. R. Civ. P. 1. *See Ex parte Uppercu*, 239 U.S. 435, 440 (1915). As stated by one district court:

> By requiring each plaintiff in every similar action to run the same gauntlet over and over again serves no useful purpose other than to create barriers and discourage litigation against the defendants. Good cause as contemplated under Rule 26 was never intended to make other litigation more difficult, costly and less efficient.

*Cippollone* v. *Liggett Group, Inc.*, 113 F.R.D. 86, 87 (D.N.J. 1986), *aff'd*, 822 F.2d 335 (3d Cir.), *cert. denied*, 484 U.S. 976 (1987).[8] In

---

[8] *Accord Wyeth Laboratories* v. *United States District Court*, 851 F.2d 321, 323-24 (10th Cir. 1988); *Wilson* v. *American Motors Corp.*, 759 F.2d 1568, 1571 (11th Cir.

*Footnote continued on next page.*

fact, one commentator (whose thesis otherwise favors strengthening protective orders) emphasized that

> the most important justification for granting nonparties access to discovery information is their need to use the information in other litigation. The issue generally arises when a nonparty asks the court that entered a protective order to modify the order to permit disclosure to him. Under these circumstances, modification furthers, rather than undermines, the policies underlying rule 1.

Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L. Rev. 1, 41 (1983) (footnote omitted).

In sum, Rule 26(c) requires every court considering whether to modify a protective order to ascertain whether "good cause" exists to maintain it and to weigh that "good cause" against the interests and needs of the entity seeking disclosure of the protected information. The trial judge has wide discretion in making that inquiry and eliciting and balancing the relevant interests, so long as the goal of the inquiry is to satisfy the Rule 26(c) "good cause" standard for the maintenance of protective orders. Inasmuch as all the Circuit Courts addressing the issue have explicitly or implicitly acknowledged that goal, there is no "real and embarrassing conflict of opinion and authority" among the Circuits which would warrant the exercise of this Court's certiorari jurisdiction.

---

*Footnote continued from previous page.*

1985); *Parkway Gallery Furniture, Inc.* v. *Kittinger/Pennsylvania House Group, Inc.*, *supra*, 121 F.R.D. at 268-69; *Deford* v. *Schmid Products Co.*, 120 F.R.D. 648, 654 (D. Md. 1987); *Ward* v. *Ford Motor Co.*, 93 F.R.D. 579, 580 (D. Col. 1982) ("[e]fficient administration of justice requires that courts encourage, not hamstring, information exchanges such as that here involved"); *U.S.* v. *Hooker Chemicals & Plastics Corp.*, 90 F.R.D. 421, 426 (W.D.N.Y. 1981).

## II.

**Certiorari Should Be Denied Because Fed. R. Civ. P. 24 Does Not Require A Permissive Intervenor Seeking To Modify A Protective Order In A Settled And Dismissed Action To Assert An Independent Basis Of Federal Jurisdiction Or File A Pleading Asserting A Claim Or Defense.**

Permissive intervention is a matter within the sound discretion of the district court, to be disturbed on review only upon a showing of clear abuse of that discretion. *NAACP* v. *New York*, 413 U.S. 345, 366 (1973). Petitioners allege such an abuse of discretion in the District Court's granting of Respondents' motion for permissive intervention absent an independent jurisdictional basis[9] and in the absence of the pleading said to be required by Fed. R. Civ. P. 24(c). Both arguments are specious and provide no basis for this Court to grant the Petition.

Petitioners assert that allowing Respondents to intervene in this action absent an independent basis of federal jurisdiction conflicted with this Court's decisions in *Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365 (1978) and *Finley* v. *United States*, 490 U.S. 545 (1989).[10] No such conflict exists, however, as those

---

[9] Petitioners note that the Tenth Circuit did not address this argument, but neglect to mention that the argument was never raised in either court below. The argument is as follows. Jurisdiction in the UNC action was based on diversity of citizenship. One of the four Respondents and one of the Petitioners have their principal places of business in Illinois, thereby destroying diversity jurisdiction as between them. According to Petitioners, Respondents did not and cannot allege any other basis of federal jurisdiction which would permit them to participate in the action.

[10] Petitioners' reliance on Justice O'Connor's separate opinion in *Diamond* v. *Charles*, 476 U.S. 54 (1986), is misplaced. That case dealt with a private physician's attempt to intervene and defend the validity of a state abortion statute, not a non-party seeking intervention in order to gain access to pretrial discovery materials for use in a collateral action. Even there, however, Justice O'Connor

*Footnote continued on next page.*

cases dealt with the unavailability of pendent party jurisdiction over defendants for whom an independent jurisdictional basis was lacking where plaintiffs sought to bring **affirmative claims** against them arising from the same action. Neither *Kroger* nor *Finley* addresses the context of a permissive intervenor making a limited discovery request but not seeking to assert a claim or defense in the action.

The same is true of the alleged conflict in Circuit Court cases addressing this issue: in each case relied on by Petitioners, an intervenor sought to become involved in the merits of the underlying litigation, as opposed to seeking access to discovery. As aptly noted by the Tenth Circuit herein, "[t]he most important circumstance in this case is that intervention was not on the merits, but for the sole purpose of challenging a protective order." 905 F.2d at 1427. None of the cases arising in the context of intervention for discovery purposes only even mentions the jurisdictional issue raised by Petitioners here.

Moreover, Respondents' participation in the action for the limited purpose of discovery had no bearing on the District Court's diversity jurisdiction. Federal diversity jurisdiction pursuant to 28 U.S.C. §1332(a)(1) contemplates diverse citizenry between the **real parties** to an action. *See Navarro Savings Ass'n* v. *Lee*, 446 U.S. 458, 460-61 (1980). In addition, once a federal court properly has jurisdiction over an action based on diversity, that jurisdiction is not "defeated by the intervention . . . of a party whose presence is not essential to a decision of the controversy between the original parties." *Wichita R. & Light Co.* v. *Public Utilities Comm'n*, 260 U.S. 48, 54 (1922). Logic and caselaw dictate, therefore, that the intervention of an entity for the limited purpose

---

*Footnote continued from previous page.*

acknowledged that "permissive intervention 'plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation . . . .'" *Id.* at 77 (citation omitted).

of obtaining access to discovery has no impact on the established diversity jurisdiction of a federal district court.[11]

In this case, the District Court correctly determined that permissive intervention pursuant to Fed. R. Civ. P. 24(b)(2) is the proper method by which a non-party may seek modification of a protective order. The Tenth Circuit's affirmance of that decision accords with decisions of the Circuit Courts that have addressed the issue. *See, e.g., Public Citizen* v. *Liggett Group, Inc., supra,* 858 F.2d at 783; *Martindell* v. *International Tel. & Tel. Corp., supra,* 594 F.2d at 294; *In re Beef Industry Antitrust Lit.,* 589 F.2d 786, 789 (5th Cir. 1979); *Meyer Goldberg, Inc. of Lorain* v. *Fisher Foods, Inc., supra,* 823 F.2d at 162. The District Court's finding that the interpretation of EIL policies issued by Petitioners was common to Respondents' pending actions provided a sufficient basis for intervention and was properly endorsed by the Tenth Circuit. Therefore, the District Court was well within its discretion in granting permissive intervention pursuant to Fed. R. Civ. P. 24(b)(2), even assuming the absence of an independent basis of federal jurisdiction.

Petitioners' peculiar argument that Respondents were required to file a Rule 24(c) pleading is not only unsupported by any caselaw, but as a practical matter defies logic and serves no juris-

---

[11] Moreover, contrary to Petitioners' assertion, the granting of permissive intervention in the absence of independent jurisdictional grounds does not enlarge federal jurisdiction in violation of Fed. R. Civ. P. 82. As the Second Circuit noted in *Lesnik* v. *Public Industrial Corp.,* 144 F.2d 968 (2d Cir. 1944):

> [J]urisdiction is not extended by mere devices making possible more complete adjudication of issues in a single case, when based upon jurisdictional principles of long standing, even though the effectiveness of the new devices makes their use more frequent. . . . Obviously a mere broadening of the content of a single federal action must not be confused with the extension of federal power; otherwise, such recognized steps as the union of law and equity or the free joinder of counter-claims would be dragged into the ambit of jurisdictional prohibitions, while actually they compress and desirably reduce the bulk and amount of federal litigation.

*Id.* at 973 (citation omitted).

prudential purpose.[12] The purpose of requiring an intervenor to file a pleading is to enable the court to determine whether permissive intervention should be granted, *Miami County Nat. Bank of Paola, Kan.* v. *Bancroft,* 121 F.2d 921, 926 (10th Cir. 1941), and to place the other parties on notice of the position, claim and relief sought by the intervenor. *Spring Construction Co., Inc.* v. *Harris,* 614 F.2d 374, 377 (4th Cir. 1980); *WJA Realty Ltd. Partnership* v. *Nelson,* 708 F. Supp. 1268, 1272 (S.D. Fla. 1989). Respondents' motion papers, which included a Rule 34 Request for Production of Documents, clearly and specifically indicated not only the factual basis for the motion to intervene and Respondents' position and interest in the action, but also the limited scope of the requested relief, thus satisfying the purpose of the Fed. R. Civ. P. 24(c) pleading provision.

Furthermore, judicial interpretation of the pleading requirement has been liberal and courts have held that the proper approach to the rule is to disregard non-prejudicial defects. *Spring Construction Co., Inc.* v. *Harris, supra,* 614 F.2d at 377; *WJA Realty Ltd. Partnership* v. *Nelson, supra,* 708 F. Supp. at 1272. *See generally* 3B *Moore's Federal Practice,* §24.14 (2d ed. 1990). Even the cases upon which Petitioners rely indicate that the pleading requirement of Fed. R. Civ. P. 24(c) may be satisfied by something less than a pleading. *See Bender* v. *Williamsport Area School Dist.,* 475 U.S. 534, 548 & n.9 (1986); *Shevlin* v. *Schewe,* 809 F.2d 447, 450 (7th Cir. 1987); *Abramson* v. *Pennwood Inv. Corp.,* 392 F.2d 759, 761 (2d Cir. 1968); *Arvidu Corp.* v. *City of Boca Raton,* 59 F.R.D. 316, 323 (S.D. Fla. 1973).

On the other hand, the cases that **do** involve intervention for discovery purposes either require less than rigid adherence to the Rule 24(c) pleading requirement or dispense with it as a mere technicality that has no meaning in this context. *See, e.g., Public*

[12] Petitioners correctly note that Fed. R. Civ. P. 24(c) provides that a party seeking intervention shall file a motion "accompanied by a pleading setting forth the claim or defense for which intervention is sought."

*Citizen* v. *Liggett Group, Inc., supra,* 858 F.2d at 784; *Martindell* v. *International Tel. & Tel. Corp., supra,* 594 F.2d at 293; *In re Beef Industry Antitrust Lit., supra,* 589 F.2d at 789. Thus, in the absence of any conflict among the Circuit Courts or disservice to the purposes of Rule 24(c), this Court should deny the Petition to the extent it seeks clarification of Fed. R. Civ. P. 24.

## CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

WILLIAM H. HYATT, JR.
PITNEY, HARDIN, KIPP & SZUCH
Park Avenue at Morris County
P.O. Box 1945
Morristown, NJ 07962-1945
(201) 966-6300

*Counsel for Respondents*

December 19, 1990

**OF COUNSEL:**

Joseph V. Giffin, Esq.
Frank K. Heap, Esq.
BELL, BOYD & LLOYD
Three First National Plaza
Suite 3200
70 West Madison Street
Chicago, IL 60602-4207
(312) 372-1121
*Counsel for Respondents*
*Waste Management, Inc. and*
*Chemical Waste Management, Inc.*

*Continued on following page*

Roger K. Timm, Esq.
John A. Ferroli, Esq.
DYKEMA GOSSETT
400 Renaissance Center
35th Floor
Detroit, MI 48243
(313) 568-6597
*Counsel for Respondent*
*South Macomb Disposal Authority*

Michael R. Fruehwald, Esq.
Lawrence A. Vanore, Esq.
BARNES & THORNBURG
1313 Merchants Bank Building
11 South Meridian Street
Indianapolis, IN 46204
(317) 638-1313
*Counsel for Respondents*
*Enviro-Chem Generators*

# APPENDIX

**RESPONDENT ROHM & HAAS COMPANY**
**SUBSIDIARIES AND AFFILIATES**

| | |
|---|---|
| Plaskon Electronic Materials, Inc. | Plaskon Electronic Materials, Inc.,subsidiary of Rohm & Haas Company |
| Polytribo, Inc. | Polytribo, Inc., subsidiary of Rohm & Haas Company |
| Rohm and Haas Bayport, Inc. | Rohm and Haas Bayport, Inc., subsidiary of Rohm & Haas Company |
| Rohm and Haas California Incorporated | Rohm and Haas California Incorporated, subsidiary of Rohm & Haas Company |
| Rohm and Haas Capital Corporation | Rohm and Haas Capital Corporation, subsidiary of Rohm & Haas Company |
| Rohm and Haas Connecticut Incorporated | Rohm and Haas Connecticut Incorporated, subsidiary of Rohm & Haas Company |
| Rohm and Haas Credit Corporation | Rohm and Haas Credit Corporation, subsidiary of Rohm & Haas Company |
| Rohm and Haas Delaware Inc. | Rohm and Haas Delaware Inc., subsidiary of Rohm & Haas Company |
| Rohm and Haas Delaware Valley Inc. | Rohm and Haas Delaware Valley Inc. subsidiary of Rohm & Haas Company |
| Rohm and Haas Equity Corporation | Rohm and Haas Equity Corporation, subsidiary of Rohm & Haas Company |
| Rohm and Haas Finance Company | Rohm and Haas Finance Company, subsidiary of Rohm & Haas Company |

| | |
|---|---|
| Rohm and Haas Illinois Inc. | Rohm and Haas Illinois Inc., subsidiary of Rohm & Haas Company |
| Rohm and Haas Kentucky Incorporated | Rohm and Haas Kentucky Incorporated, subsidiary of Rohm & Haas Company |
| Rohm and Haas Latin America, Inc. | Rohm and Haas Latin America, Inc., subsidiary of Rohm & Haas Company |
| Rohm and Haas Science Inc. | Rohm and Haas Science Inc., subsidiary of Rohm & Haas Company |
| Rohm and Haas Southern California Inc. | Rohm and Haas Southern California Inc., subsidiary of Rohm & Haas Company |
| Rohm and Haas Technology Holdings, Inc. | Rohm and Haas Technology Holdings, Inc., subsidiary of Rohm & Haas Company |
| Rohm and Haas Tennessee Incorporated | Rohm and Haas Tennessee Incorporated, subsidiary of Rohm & Haas Company |
| Rohm and Haas Texas Incorporated | Rohm and Haas Texas Incorporated, subsidiary of Rohm & Haas Company |
| Romicon, Inc. | Romicon, Inc., subsidiary of Rohm & Haas Company |
| The Southern Resin and Chemical Company | The Southern Resin and Chemical Company, subsidiary of Rohm & Haas Company |
| Supelco, Inc. | Supelco, Inc., subsidiary of Rohm & Haas Company |

| | |
|---|---|
| Laboratorios Quimicos Industriales, S.A. | Laboratorios Quimicos Industriales, S.A., subsidiary of Rohm & Haas Company |
| Maquiladora General de Matamoros, S.A. de C.V. | Maquiladora General de Matamoros, S.A. de C.V., subsidiary of Rohm & Haas Company |
| Plaskon Electronic Materials, Ltd. | Plaskon Electronic Materials, Ltd., subsidiary of Rohm & Haas Company |
| Rohm and Haas Australia Pty. Ltd. | Rohm and Haas Australia Pty. Ltd., subsidiary of Rohm & Haas Company |
| Rohm and Haas (Bermuda), Ltd. | Rohm and Haas (Bermuda), Ltd., subsidiary of Rohm & Haas Company |
| Rohm and Haas Brasil Ltda. | Rohm and Haas Brasil Ltda. a subsidiary of Rohm & Haas Company |
| Rohm and Haas Canada Inc. | Rohm and Haas Canada Inc., subsidiary of Rohm & Haas Company |
| Rohm and Haas Centro America S.A. | Rohm and Haas Centro America S.A., subsidiary of Rohm & Haas Company |
| Rohm and Haas Colombia S.A. | Rohm and Haas Colombia S.A., subsidiary of Rohm & Haas Company |
| Rohm and Haas Deutschland GmbH | Rohm and Haas Deutschland GmbH, subsidiary of Rohm & Haas Company |
| Rohm and Haas Espana S.A. | Rohm and Haas Espana S.A., subsidiary of Rohm & Haas Company |

| | |
|---|---|
| Rohm and Haas Foreign Sales Corporation | Rohm and Haas Foreign Sales Corporation, subsidiary of Rohm & Haas Company |
| Rohm and Haas France S.A. | Rohm and Haas France S.A., subsidiary of Rohm & Haas Company |
| Rohm and Haas Holdings, Ltd. | Rohm and Haas Holdings, Ltd., subsidiary of Rohm & Haas Company |
| Rohm and Haas Italia S.r.l. | Rohm and Haas Italia S.r.l., subsidiary of Rohm & Haas Company |
| Rohm and Haas Japan K.K. | Rohm and Haas Japan K.K., subsidiary of Rohm & Haas Company |
| Rohm and Haas Mexico S.A. de C.V. | Rohm and Haas Mexico S.A. de C.V., subsidiary of Rohm & Haas Company |
| Rohm and Haas New Zealand Limited | Rohm and Haas New Zealand Limited, subsidiary of Rohm & Haas Company |
| Rohm and Haas Nordiska AB | Rohm and Haas Nordiska AB, subsidiary of Rohm & Haas Company |
| Rohm and Haas Philippines, Inc. | Rohm and Haas Philippines, Inc., subsidiary of Rohm & Haas Company |
| Rohm and Haas Scotland | Rohm and Haas Scotland, subsidiary of Rohm & Haas Company |
| Rohm and Haas (UK) Limited | Rohm and Haas (UK) Limited, subsidiary of Rohm & Haas Company |

| | |
|---|---|
| Romicon, B.V. | Romicon, B.V., subsidiary of Rohm & Haas Company |
| Akril | Akril, affiliate of Rohm & Haas Company |
| Eastern Rohm and Haas Development Center | Eastern Rohm and Haas Development Center, affiliate of Rohm & Haas Company |
| Japan Acrylic Chemical Co., Ltd. | Japan Acrylic Chemical Co., Ltd., affiliate of Rohm & Haas Company |
| Modipon Limited | Modipon Limited, affiliate of Rohm & Haas Company |
| NorsoHaas, S.A. | NorsoHaas, S.A., affiliate of Rohm & Haas Company |
| Quimica Trepic, S.A. de C.V. | Quimica Trepic, S.A. de C.V., affiliate of Rohm & Haas Company |
| Shipley Company | Shipley Company, affiliate of Rohm & Haas Company |
| SumikaHaas | SumikaHaas, affiliate of Rohm & Haas Company |
| Tokyo Organic Chemical Industries, Ltd. | Tokyo Organic Chemical Industries, Ltd., affiliate of Rohm & Haas Company |
| TosoHaas | TosoHaas, affiliate of Rohm & Haas Company |
| Yugocryl | Yugocryl, affiliate of Rohm & Haas Company |

## RESPONDENT SOUTH MACOMB DISPOSAL AUTHORITY

Respondent South Macomb Disposal Authority has no corporate parents, subsidiaries or affiliates.

## RESPONDENTS WASTE MANAGEMENT, INC., AND CHEMICAL WASTE MANAGEMENT, INC.

### SUBSIDIARIES

| | |
|---|---|
| The Brand Companies | The Brand Companies, subsidiary of Waste Management, Inc., and Chemical Waste Management, Inc. |
| Chemical Waste Management of Baja California | Chemical Waste Management of Baja California, subsidiary of Waste Management, Inc., and Chemical Waste Management, Inc. |
| Tratamientos Industriales Tijuana Internacional, S.A. de C.V. | Tratamientos Industriales Tijuana Internacional, S.A. de C.V., subsidiary of Waste Management, Inc., and Chemical Waste Management, Inc. |
| Waste Management International, Inc. | Waste Management International, Inc., subsidiary of Waste Management, Inc., and Chemical Waste Management, Inc. |

**RESPONDENTS GENERATORS OF WASTE AT THE ENVIRONMENTAL CONSERVATION AND CHEMICAL CORPORATION SITE, In Zionsville, Indiana**

**AFFILIATED ENTITIES INVOLVED WITH ENVIRO-CHEM SITE**

| | |
|---|---|
| A. O. Smith Corporation | A. O. Smith Corporation, parent corporation to Hermatic Motor Div., located in Milwaukee, Wisconsin |
| Amtrak National Railroad Passenger Corporation | Amtrak, affiliated with National Railroad Passenger Corp., located in Beech Grove, Indiana |
| American Can Company | American Can Packaging, Inc., division of American Can Company, located in Hoopeston, Illinois |
| | American National Can Company, successor to rights and liabilities of American Can Company, its division, American Can Packaging, Inc., and its prior successor, National Can Corporation |
| American Standard, Inc. | American Standard, Inc., parent corporation of American Standard, Peabody Unit, corporate headquarters in New York, New York |

| | |
|---|---|
| Anaconda-Ericsson, Inc. | Ericsson Cables, Inc., assumed assets and liabilities of Ericsson, Inc., former parent corporation of Anaconda-Ericsson, located in Richardson, Texas |
| Anderson Development Company | Anderson Development Co., plant and headquarters located in Adrian, Michigan |
| Arvinyl, Inc. | Arvinyl, division of Arvin Industries, Inc., located in Columbus, Indiana |
| Roll Coater, Inc. | Roll Coater, Inc., subsidiary of Arvin Industries, Inc., located in Greenfield, Indiana |
| | Arvin Automotive, division of Arvin Industries, Inc., located in Indianapolis, Indiana |
| | Arvin Industries, Inc., parent company of Arvinyl, Roll Coater and Arvin Automotive, with headquarters in Columbus, Indiana |
| Bemis Company, Inc. | Bemis Company, Inc. (f/k/a Bemis Bag Co.), located in Terre Haute, Indiana, with headquarters in Minneapolis, Minnesota |
| Bootz Manufacturing Company, Inc. | Bootz Manufacturing Company, Inc., plant and headquarters located in Evansville, Indiana |

| | |
|---|---|
| Brenner Engineering & Manufacturing, Inc. | Brenner Engineering & Manufacturing, Inc., affiliated with Handy & Harman, located in Bedford, Indiana |
| C.T.S. Microelectronics, Inc. | CTS Microelectronics, Inc., located in Lafayette, Indiana |
| | CTS Microelectronics, Inc. is now named CTS Corporation, Microelectronics Division |
| | CTS Corporation, parent corporation of CTS Corporation, Microelectronics Division, located in Elkhart, Indiana |
| Carpenter Body Works, Inc. | Carpenter Body Works, Inc., plant and headquarters located in Mitchell, Indiana |
| Carter Paint Company, Inc. | Carter Paint Company, Inc., plant and headquarters located in Liberty, Indiana |
| Celotex Corporation | The Gamble Brothers Division of the Celotex Corporation, former division of Celotex Corporation, located in Louisville, Kentucky |

| | |
|---|---|
| Centralab, Inc. | Nepco/Centralab, a subsidiary company of North American Phillips Corp., located in West Lafayette, Indiana, (Presently, Mepco/Centralab is a division of North American Phillips Corp. named Phillips components Discrete Products Division) |
| | Magnavox Government & Industrial Electronics Company, a subsidiary of North American Phillips Corp., located in Ft. Wayne, Indiana |
| Chromalloy American Corporation | Precoat Metals, a division of Chromalloy American Corporation |
| Conco, Inc. | Conco, Inc., a division of H. D. Conkey Co., plant located in Louisville, Kentucky, headquarters located in Mendota, Illinois |
| Crown Zellerbach Corporation | Crown Zellerbach Corporation, affiliated with James River Corporation, with plants located in Greensburg, Indiana and Hazelwood, Missouri |
| D&L Paint Company, Inc. | D&L Paint Co., Inc., located in Cambridge City, Indiana, headquarters in Liberty, Indiana |

| | |
|---|---|
| Dennis Chemical Company | Dennis Chemical Company, plant and headquarters in St. Louis, Missouri |
| Detrex Chemical Industries, Inc. | Detrex Chemical Industries, Inc., parent company of Gold Shield Solvent, located in Southfield, Michigan |
| Diamond Chain Company | Diamond Chain Company, division of Amsted Industries, Inc., located in Indianapolis, Indiana |
| Economy Plating Company, Inc. | Economy Plating Company, Inc., plant and headquarters formerly located in Zionsville, Indiana<br><br>Economy Plating Company, Inc. is now named Electro-Spec Inc., and is now located in Franklin, Indiana |
| The Egyptian Lacquer Manufacturing Company | Egyptian Lacquer Manufacturing Company, Inc., plant and headquarters located in Lafayette, Indiana |
| Mid-West Body, Inc. | Midwest Body Mfg., Inc., located in Paris, Illinois |
| U.S.M. Corporation | Bostik Division, former division of USM Corporation, located in Marshall, Michigan (USM Corporation has been affiliated with Emhart Corporation.) |

| | |
|---|---|
| | Bailey Division, former division of USM Corporation (USM Corporation has been affiliated with Emhart Corporation.) |
| | Mallory Capacitor, division of Emhart Industries, Inc., located in Indianapolis, Indiana (Emhart Industries, Inc. has been affiliated with Emhart Corporation.) |
| | Mallory Timers, division of Emhart Industries, Inc., located in Frankfort, Indiana (Emhart Industries, Inc. has been affiliated with Emhart Corporation.) |
| | Emhart Corporation, is now owned by the Black & Decker Corporation, located in Hartford, Connecticut |
| Federal Mogul Corporation | Federal Mogul Corporation, plants located in Van Wert, Ohio, Frankfort, Indiana, and Mooresville, Indiana, headquarters in Detroit, Michigan |
| | Switches, Inc., former subsidiary of Federal Mogul Corporation |

| | |
|---|---|
| Ford Motor Company | Ford Motor Company, plants located in St. Paul, Minnesota and Louisville, Kentucky, headquarters in Dearborn, Michigan |
| Foy-Johnston, Inc. | Foy-Johnston, located in Cincinnati, Ohio<br><br>Foy-Johnston is now named Cincinnati Varnish |
| General Motors Corporation | The following General Motors Corporate Divisions:<br><br>Delco Electronics—Kokomo, Indiana<br><br>Fisher Body Division—Marion, Indiana<br><br>Chevrolet Division —Indianapolis, Indiana<br><br>Delco-Remy Division —Anderson, Indiana |
| The Grote Manufacturing Company | Grote Manufacturing Company, plant and headquarters located in Madison, Indiana |
| Gulf & Western Manufacturing Company | Bohn Heat Transfer Group, Division of Gulf & Western Mfg. Co., located in Danville, Illinois<br><br>Bohn Engine & Foundry, division of Gulf and Western Mfg. Co., located in Greensburg, Indiana |

| | |
|---|---|
| | Vickes Manufacturing Co., former subsidiary of Gulf and Western Mfg. Co., located at Southfield, Michigan |
| H-C Industries, Inc. | H-C Industries, Inc., plant and headquarters located in Crawfordsville, Indiana |
| Haas Cabinet Company, Inc. | Haas Cabinet Co., Inc., plant and headquarters located in Inc. Sellersburg, Indiana |
| Hamilton Glass Products, Inc. | Hamilton Glass Company, plant and headquarters located in Vincennes, Indiana |
| | From 1977-80, National Gypsum Co. owned Hamilton Glass Company |
| Inmont Corporation | Inmont Corporation, plants located in Bound Brook, New Jersey, Cincinnati, Ohio and Huntington, Indiana, headquarters in Clifton, New Jersey |
| K.C.L. Corporation | KCL Corporation, plant and headquarters located in Shelbyville, Indiana |
| Tappan Company | Kemper, a division of The Tappan Company, plant located in Richmond, Indiana |

| | |
|---|---|
| | White Consolidated Industries, parent company of Kemper, headquarters in Cleveland, Ohio |
| Kimberly-Clark Corporation | Brown-Bridge, a division of Kimberly-Clark Corporation, plants located in Troy, Ohio and Ellina, Ohio |
| Knauf Fiberglass | Knauf Fiber Glass GmbH, plant and headquarters located in Shelbyville, Indiana |
| Kolmar Laboratories, Inc. | Kolmar Laboratories, Inc., plant and Executive Offices in Port Jervis, New York |
| Kyanize Paints, Inc. | Kyanize Paints, Inc., located in Springfield, Illinois |
| | Kyanize Paints, Inc. is now named CKP, Inc. |
| The Lenk Company | Lenk Company, located in Franklin, Kentucky |
| | Lenk Company is affiliated with the Drackett Company located in Cincinnati, Ohio |
| Liberty Solvents and Chemical Company, Inc. | Liberty Solvents and Chemicals Company, Inc., plant and headquarters located in Twinsburg, Ohio |
| Lilly Industrial Coatings, Inc. | Lilly Industrial Coatings, Inc., plants located in Memphis, Tennessee and Paulsboro, New Jersey, with Corporate Office in Indianapolis, Indiana |

| | |
|---|---|
| Louisville Varnish Company, Inc. | Louisville Coatings, Inc., plant located in Louisville, Kentucky |
| | Kurfees Coatings, Inc., Louisville, Kentucky, acquired Louisville Coatings in 1984 |
| Edward H. Marcus Paint Company, Inc. | E. H. Marcus Paint Co., Inc., plant and headquarters located in Louisville, Kentucky |
| | E. H. Marcus Paint Company is now named Marcus Paint Company |
| Mobil Chemical Company | Mobil Chemical Co., plant located in Louisville, Kentucky |
| | Mobil Oil Corporation, parent of Mobil Chemical Company, New York, New York |
| Paulo Products Company | Paulo Products Company, plant and headquarters located in St. Louis, Missouri |
| Potlatch Corporation | Potlatch Corporation, plant located in Louisville, Kentucky, with headquarters in San Francisco, California |
| Potter Paint Company of Indiana, Inc. | Potter Paint Company of Indiana, Inc., plant and headquarters in Cambridge City, Indiana |

| | |
|---|---|
| Pratt & Lambert, Inc. | Pratt & Lambert, plants located in Buffalo, New York, Kansas City, Missouri and Carlstadt, New Jersey, headquarters in Buffalo, New York |
| Radio Material Company | Radio Materials Corporation, plant and headquarters located in Attica, Indiana |
| Ramsey Corporation | Ramsey Corporation, a former subsidiary of TRW, Inc., plant located in North Manchester, Missouri |
| | Ross Gear, a division of Ramsey Corporation, plant located in Indiana |
| | TRW, Inc., located in Cleveland, Ohio |
| Reliance Electric Company | Reliance Electric Company, one plant located in Madison, Indiana, and two in Columbus, Indiana, with headquarters in Cleveland, Ohio |
| Rexham Corporation | Rexham Corporation, plant located in Edinburgh, Indiana, headquarters in New York, New York |
| Robbie Manufacturing, Inc. | Robbie Manufacturing, Inc., plant and headquarters located in Lenera, Kansas |

| | |
|---|---|
| Rostone Corporation | Rostone Corporation, a division of Allen-Bradley Co., with plant located in Lafayette, Indiana |
| Solvent Recovery Service, Inc. | Solvent Recovery Service of New Jersey, Inc. |
| | Solvent Recovery Service of New England, Inc. |
| | Solvent Recovery Service, Inc., holding company of above operating entities |
| Smith Cabinet Manufacturing Company, Inc. | Smith Cabinet Manufacturing Co., Inc., plant and headquarters located in Salem, Indiana |
| Sparton Indiana, Inc. | Sparton Indiana, Inc. |
| | Sparton Indiana, Inc. is now known as Sparton Engineered Products, Inc.—KPI Group |
| Square D Company | Square D Company, plants located in Oxford, Ohio, Peru, Indiana and Huntington, Indiana, headquarters at Palatine, Illinois |
| St. Regis Paper Company | St. Regis Paper Company, former subsidiary of St. Regis Corporation, plants located in Marion, Indiana and Louisville, Kentucky |

| | |
|---|---|
| | Champion International Corporation acquired St. Regis Paper Company and St. Regis Corporation in 1984-85 |
| The Stolle Corporation | The Stolle Corporation, plant located in Sidney, Ohio |
| Sun Chemical Corporation | Sun Chemical Corporation, plant in Frankfort, Indiana |
| | Sun Chemical Corporation, General Printing Ink Div., plant in Northlake, Illinois |
| | Sun Chemical Corporation is now named Sequa Corporation |
| Techtronics Ecological Corporation | Techtronics Ecological Corporation (changed name from Techtronics Solvents Recycling Corporation in early '80s), plant and headquarters located in Brooklyn, New York |
| Thiele-Engdahl, Inc. | Thiele-Engdahl, Inc., plant located in South Plainfield, New Jersey and headquarters in Winston-Salem, North Carolina |
| U.S. Gypsum/Durabond Products Company | Durabond Products Company, a subsidiary of United States Gypsum Company, plant located in Rosemont, Illinois |

| | |
|---|---|
| | DAP Inc. is successor in interest to Durabond Products Company |
| Union Carbide Corporation | Union Carbide Corporation, plants located in Bound Brook, New Jersey, Kentland, Indiana, Paducah, Kentucky, Indianapolis, Indiana and Centerville, Iowa, headquarters located in Danbury, Connecticut |
| Universal Woods, Inc. | Universal Woods, Inc., plant located in Louisville, Kentucky, headquarters in Richmond, Virginia. |
| Wayne Corporation | Wayne Transportation Division, a division of Wayne Corporation, plant located in Richmond, Indiana |
| Western Electric | Western Electric Company, Inc., affiliated with AT&T, two plants located in Indianapolis, Indiana (2525 Shadeland Avenue, Indianapolis Work and 2855 No. Franklin Road—Indiana Service Center) |
| | AT&T, parent organization of Western Electric Company, Inc., located in Berkeley Heights, New Jersey |

| | |
|---|---|
| Westvaco | Westvaco U.S. Envelope Division, division of Westvaco Corporation, plant located in Indianapolis, Indiana |
| Whittaker Corporation | Dayton Coatings & Chemical, a division of Whittaker Corporation, plant located in West Alexandria, Ohio |
| Zimmer Paper Products, Incorporated | Zimmer Paper Products, Inc., plant located and headquartered in Indianapolis |